No. 83-1252

In the Supreme Court of the United States

OCTOBER TERM, 1983

NEURO AFFILIATES, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the Board properly overruled, without an evidentiary hearing, two of the Employer's election objections.

2. Whether, in the circumstances of this case, the court of appeals properly held that any error committed by the Regional Director in failing to transmit to the Board all affidavits collected in his investigation of the Employer's election objections constituted harmless error and therefore did not preclude enforcement of the Board's bargaining order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35-38) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 21-32) and the decision in the underlying representation proceeding (Pet. App. 1-20) are noted at 263 N.L.R.B. No. 29, but also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1983 (Pet. App. 39). The petition for a writ of certiorari was filed on January 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, as well as another statutory provision (28 U.S.C. 2112(b)) on which petitioner relies, are set forth at Pet. App. 40-43.

STATEMENT

1. Pursuant to stipulations between petitioner, Neuro Affiliates d/b/a Crossroads Hospital (the Employer), and the Hospital and Service Employees Union Local 399, AFL-CIO (the Union), a representation election was held on May 15, 1981, in a unit of nonprofessional employees at the Employer's facility in Burbank, California. The tally of ballots showed 36 votes for the Union and 17 against; there were 13 challenged ballots and 1 void ballot. The challenged ballots were not sufficient in number to affect the outcome of the election. Pet. App. 1.

The Employer filed objections to the election, alleging, inter alia, that the Union had distributed a misleading flyer two days prior to the election, that the Union's ballot challenges were improper and discriminatory, and that, because the Board agent conducting the election permitted the Union to make those ballot challenges, the agent gave an impression of favoring the Union. Pet. App. 1-13.

The Regional Director investigated the Employer's objections. During the course of the investigation, the Employer was offered an opportunity to submit evidence, and it submitted documents, including witness affidavits, to the Regional Director (Pet. 17 n.15; Pet. App. 38). Following his own investigation and his consideration of the Employer's evidence, the Regional Director recommended that the objections be overruled in their entirety and that the Union be certified. Attached to the Regional Director's report were certain exhibits, including campaign literature of the Union and the Employer, on which the Regional Director had relied. Pet. App. 1-18.

The Employer filed exceptions to the Regional Director's recommendation and requested a new election or a hearing. In its exceptions, the Employer reiterated its objections to the election and asserted that the Regional Director had

abused his discretion by failing to transmit the entire record to the Board. Pet. App 23. The Employer attached its affidavits to its brief in support of its exceptions (R. Doc. No. 12).[1] On March 4, 1982, the Board denied the exceptions, adopted the findings and recommendations of the Regional Director, and certified the Union as bargaining representative (Pet. App. 19-20).

2. The Employer subsequently refused to bargain with the Union. The Board, finding that the Employer had thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), entered a bargaining order (Pet. App. 21-34). The Employer appealed on the grounds that its refusal to bargain was lawful because its election objections were meritorious and because, in any event, the Board did not have the full record before it when it overruled those objections and certified the Union (Pet. App. 35).

3. The court of appeals enforced the Board's order in an unpublished memorandum opinion (Pet. App. 35-39). The court agreed with the Board that the Employer had failed to raise any factual issue entitling it to a hearing on its election objections, and had failed to offer any evidence that the allegedly objectionable conduct had coerced employees in voting (*id.* at 36). It also noted (*id.* at 37) that the Employer had submitted no evidence that the Union's pre-election flyer contained any material misrepresentation and that the Board was warranted in concluding that the voters could adequately evaluate the flyer. With regard to the claim that the Board agent's behavior gave an appearance of bias, the court noted (*ibid.*) that there was no evidence to this effect

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[1] "R. Doc. No." refers to the document number in the record filed in the court of appeals.

and that her handling of the ballot challenges was "consonant with Board policies" and could not reasonably have been construed as "impugning the Board's election standards" (*ibid.*).

Finally, the court rejected the Employer's claims regarding the adequacy of the record before the Board. The court found that the record was complete except for two witness statements referred to by the Regional Director. It observed that neither of these statements could have supported the Employer's contentions or raised a material issue of fact, since the Regional Director referred to them merely in connection with undisputed matters or matters irrelevant to the grounds on which the objections were overruled. Pet. App. 37-38. The court accordingly held (*id.* at 38) that "[a]ny possible failure by the [Regional] Director to forward these statements to the Board was thus harmless error."

ARGUMENT

The unpublished decision of the court of appeals is correct.[2] Moreover, it concerns highly fact-bound determinations that raise no issue warranting review by this Court.

1. The Employer contends that the Board improperly overruled an election objection pertaining to a flyer distributed by the Union to the employees prior to the election (Pet. 7-10) and that it erred in failing to order a hearing on another objection pertaining to the Board agent's treatment of ballot challenges made by the Union during the election (Pet. App. 16-20). The Employer further contends (Pet.

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[2]Because the court of appeals concluded that the issues presented by this case do not meet the standards set by Rule 21 of the rules of that court for disposition by written opinion, it ordered that the opinion below not be published and prohibited citation of it as precedent. Pet. App. 35 n.*.

10-12) that the court of appeals applied an incorrect standard of review in upholding the Board's overruling of these objections. These contentions are without merit.

a. Prior to the election, the Employer distributed to its employees literature suggesting that their wages were better than those of employees in other area hospitals, that they should question the Union on this matter, and that they should be wary of being "easily swayed by [the Union's] pie-in-the-sky promises" (Pet. App. 3). The paragraph concluded by asking, "[w]hat, *precisely*, has been offered in writing?" (*ibid.* (emphasis in original)). The Union responded with the challenged campaign flyer that recited certain "guarantees" made by the Union to the employees and listed certain "guarantees" respecting wages, benefits, and grievance-handling that it suggested the employees seek to have the Employer's administrator sign (Pet. App. 2-3, 14-17). The Regional Director rejected the Employer's contention that the election should be overturned because the Union's flyer represented a deceptive effort to ridicule the Employer and trap it into committing unfair labor practices (*id.* at 3-5).

The Regional Director reasoned that, as a response to the Employer's literature implicitly challenging the Union to put its promises into writing, the Union's flyer amounted to "no more than typical campaign rhetoric of the type amenable to employee evaluation" (Pet. App. 4). The court of appeals properly declined to reverse that determination, agreeing that, under the circumstances, the weight to be attached to the Union's flyer could be left "to the good sense of the voters" (*id.* at 37). See also *Letter Carriers* v. *Austin*, 418 U.S. 264, 277 n.12 (1974) ("[w]ide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions * * *"); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60 (1966)

(citing with approval Board's policy, explained in *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953), of leaving the appraisal of campaign propaganda "to the good sense of the voters").

In contending (Pet. 8-10) that this ruling conflicts with the Third Circuit's opinion in *Jamesway Corp.* v. *NLRB*, 676 F.2d 63 (1982), the Employer disregards a number of significant distinctions between the two cases. In the first place, the handbill that was at issue in *Jamesway* was not, as in this case, a response to the employer's own similar campaign literature. Moreover, in concluding that the handbill constituted objectionable conduct, the *Jamesway* court emphasized (*id.* at 69-70) both that the document included a misleading suggestion calculated to alarm newly hired employees about possible layoffs if the union lost the election[3] and that this threat was underscored by an oral statement made by a member of the union's organizing committee. It was the addition of these latter actions — the union's falsely creating the impression that the employer would lay off newly hired employees unless the union won the election — that the Third Circuit found to be coercive, not the mere guarantee request. *Ibid.* By contrast, here the Union simply suggested that the employees request the Employer to sign

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[3]In *Jamesway*, the Union had presented the following document to the employer on the eve of the election (676 F.2d at 69):

> We, the District 65 organizing committee would like a guarantee in writing that the Company will not lay-off or reduce any of the work force of Jamesway Store # 32 after the election or in the future.
>
> District 65 Organizing Committee[.]

The challenged handbill contained a copy of the foregoing document "marked with a distinctive notation" (*ibid.*):

> Mr. Madison & Mr. Christo *Refused* to signed [sic] this in order to protect the New Worker Hired in the Last 3 or 4 Mo.

certain guarantees; the Union made no additional statements to employees suggesting that a refusal by the Employer would mean that it would reduce employee benefits or otherwise retaliate against the employees. Nor was the Union's brochure in this case directed to a particularly vulnerable group of employees.

Finally, the *Jamesway* court relied heavily (676 F.2d at 71) on the closeness of the balloting results in that case — assuming the two unresolved ballot challenges were resolved in the employer's favor, the union would have won by only one vote. None of those circumstances is present here. In any event, even if the circumstances of these two cases were similar, the question whether a Board election should be overturned because of the distribution of a particular type of flyer not known to have been distributed in more than two union campaigns is not of sufficient importance to warrant review by this Court.[4]

b. During the election, the Union's observer challenged the ballots of 11 of the 67 employees who voted, claiming that they were professional or confidential employees — categories specifically excluded from the unit pursuant to

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[4]Because the Board correctly concluded that the flyer in the present case did not constitute a material misrepresentation, there was no need for it to consider whether the Employer had an opportunity to make an adequate reply under the standard for assessing election misrepresentations set out in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962). The cases cited by the Employer (Pet. 9 n.9) respecting ability to reply therefore are inapposite. In any event, in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982), the Board overruled *Hollywood Ceramics* and announced that it "will no longer probe into the truth or falsity of the parties' campaign statements" (*id.* at 133), but rather will assume that " 'employees [are] mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it' " (*id.* at 132, quoting *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313 (1977)). Because the Board no longer has occasion to rule on issues concerning a party's ability to reply to campaign misrepresentations, review by the Court of that issue is unnecessary.

the parties' election agreement (Pet. App. 8). The Board agent processed all challenged ballots according to the Board's published policies,[5] and she explained those policies to employees who expressed concern over having their ballots challenged (*ibid.*). After giving the explanation, she asked the employees to leave the polling area so as not to disrupt the election (*id.* at 9).

Because the voters challenged by the Union were in job classifications included in the unit stipulation, the Employer contended that the Union must have had discriminatory motives for challenging them and that the Board agent's processing of the challenges therefore gave the appearance of agency bias (Pet. App. 5-8).[6] The Employer

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[5]Procedures for handling ballot challenges are set out in *National Labor Relations Board Casehandling Manual: Representation Proceedings*, Pt. 2, §§ 11338 *et seq.* (Oct. 1975). Under these procedures, a party may challenge a voter's eligibility without unduly "disrupting the regular flow of votes" (*id.* at § 11338). The eligibility issue is determined in a post-election proceeding if it becomes necessary — that is, if it turns out that the challenged ballots could affect the election results. A challenged voter secretly records his vote in the same manner as any other voter, but instead of immediately depositing his folded ballot into the ballot box, he first seals it in a special envelope given him by the Board agent (*id.* at § 11338.1). The voter's identity and the identity of the challenging party are recorded on a removable stub attached to the envelope (*ibid.*). The Manual further provides (*id.* at § 11338.4):

> Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly, and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter, quickly and lucidly, the measures which will be taken to protect the secrecy of the challenged ballot.

See also 29 C.F.R. 102.69(a) and (b).

[6]The Employer linked this objection to another objection concerning the Board agent's refusal to permit the Employer's observer to challenge a voter after he had already voted (Pet. App. 5-8). The Employer is not pressing that objection in its petition to this Court.

submitted as evidence a note written by Bruce Powers, a Union election observer, several days after the election, in which he explained to three employees why he had challenged them (Pet. App. 9, 18), and an affidavit by one of the Employer's election observers, Estrella Gonzalez, stating that she personally knew that eight of the 11 voters challenged by the Union were anti-union employees, that the Union had not challenged some pro-union employees in the same classifications, and that she and other challenged voters were upset at the idea of their being challenged because of their pro-employer sympathies (Pet. 17 n.15). One of the challenged voters, Gonzalez asserted, had discussed her opposition to being challenged with employees waiting in line to vote. There was no allegation, however, that any employee had been told by the Union or by any supporter of the Union that anti-union employees would be challenged (Pet. App. 8-9).

The Regional Director concluded that the note from Powers did not plainly suggest that discriminatory considerations had motivated the Union's challenges, and he reasonably observed that the note itself, written days after the election, could not have had any impact on the election (Pet. App. 10). His ultimate conclusion was that the Board agent did not, by her conduct, tolerate any evident abuse of the election procedure by the Union[7] and that she "engaged in no conduct that tended to foster in the minds of voters the impression that the Board was not neutral as between the choices on the ballot" (*id.* at 11).

The Employer does not contend that the Board agent's handling of the Union's challenges departed from agency guidelines (note 5, *supra*), and the court of appeals

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[7]An employee is not necessarily immunized from challenge merely because his job title is included in a unit stipulation. See *W. W. Grainger, Inc.*, 207 N.L.R.B. 966, 966-967 n.1 (1973); *Fisher-New Center Co.*, 184 N.L.R.B. 809, 810 (1970).

reasonably concluded that none of the Employer's specific allegations concerning events that could have been observed by the employees or the Board agent was sufficient to "sustain its charge" of apparent Board agent bias or to warrant a hearing (Pet. App. 37). That conclusion is sound. The Employer's allegations concerning events that could be observed by employees eligible to vote established no incidents that would meet the test for overturning a Board election, *i.e.*, conduct likely to interfere " 'with the employees' exercise of free choice to such an extent that [it] materially affected the results of the election.' " *NLRB* v. *Bostik Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)). Accord, *Worley Mills, Inc.* v. *NLRB*, 685 F.2d 362, 368 (10th Cir. 1982), and cases there cited. It is well established that the Board is not required to hold a hearing when there is nothing to be heard. *NLRB* v. *Carolina Natural Gas Corp.*, 386 F.2d 571, 574 (4th Cir. 1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (5th Cir. 1964).

c. In upholding the Board's overruling of the Employer's election objections, the court of appeals applied an "abuse of discretion" standard (Pet. App. 35). The Employer contends (Pet. 10-12) that use of this standard of review conflicts with the Third Circuit's decision in *Jamesway Corp.* v. *NLRB*, 676 F.2d at 66-69, in which the court applied a "substantial evidence" standard in reviewing the Board's determination of the impact of allegedly objectionable conduct on a representation election. Any such conflict has been eliminated, however, by a subsequent en banc decision, *NLRB* v. *ARA Services, Inc.*, 717 F.2d 57, 68 (1983), in which the Third Circuit implicitly overruled *Jamesway* on that point, stating that another prior decision suggesting anything other than an "abuse of discretion" standard for reviewing Board election determinations "must in the future be disregarded."

Recently, in *Mosey Manufacturing Co.* v. *NLRB*, 701 F.2d 610 (1983), the en banc Seventh Circuit embraced a "substantial evidence" standard for reviewing the Board's application of its election rules to "contested facts," including such questions as whether a particular misrepresentation would be likely to affect an election (*id.* at 615). The present case, however, provides no basis for reviewing any conflict in standards of review. In considering the standards applied by other courts of appeals, the *Mosey* court read the Ninth Circuit's decisions as effectively applying a substantial evidence standard even when the term "abuse of discretion" was used. 701 F.2d at 614. The Seventh Circuit, therefore, apparently perceives no conflict with the Ninth Circuit on this question.

To be sure, in the Board's view, "abuse of discretion" is the proper standard and it differs from the "substantial evidence" standard to the extent that the outcome of some review proceedings could be affected.[8] In the present case,

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[8]The Board agrees that the "substantial evidence" standard properly applies to any Board findings of narrative fact — that is, what was said or done in a given situation. With respect to the Board's determinations of whether assumed or undisputed facts constitute adequate grounds for setting aside an election, however, the appropriate inquiry for a reviewing court is whether the Board has applied its own election policies in a manner that is not arbitrary, capricious, or an abuse of discretion. This is the same standard that is applied in other areas in which Congress has delegated broad discretion to the Board. See *Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983), slip op. 4-5 (devising appropriate remedies for unfair labor practices); *NLRB* v. *Magnetics International, Inc.*, 699 F.2d 806, 812 & n.5 (6th Cir. 1983) (decision whether to defer to arbitration); *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F.2d 318, 323 (2d Cir. 1981) (same); *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F.2d 517, 520 (7th Cir. 1967), cert. denied, 389 U.S. 1041 (1968) (determining appropriate bargaining units). Due respect for Congress's even broader delegation of discretion to the Board in the election area requires the conclusion that the Board's ultimate findings here should be accorded no less deference.

Furthermore, although "[t]here are no talismanic words that can avoid the process of judgment," *Universal Camera Corp.* v. *NLRB*, 340

however, as our discussion of the allegations underlying the Employer's objections makes clear (pages 5-10, *supra*), the Board's determination should survive scrutiny under either standard of review.

2. The Employer erroneously asserts (Pet. 12-15) that applicable precedents in the Fourth, Fifth, and Sixth Circuits conflict with the court of appeals' holding that any error committed by the Regional Director in failing to transmit to the Board all affidavits collected in his investigation of the Employer's election objections constituted harmless error and therefore did not preclude enforcement of the Board's bargaining order.

The Fourth Circuit precedent on which the Employer relies does not avail it. In *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1361-1362 (4th Cir. 1983), the court explained that *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980) (Pet. 14-15), was based on the court's view that the Board's then-existing rule regarding documents to be transmitted to the Board in election objections cases in which no hearing was held (29 C.F.R. 102.69(g) (1981)) was ambiguous and failed to put parties challenging an election on notice that it was their responsibility to transmit to the Board any evidence they wished the Board to consider. The Board has since amended that rule to make it even clearer that supporting affidavits are not part of the record unless submitted to the Board by the employer (46 Fed. Reg. 45922-45924 (1981)), and the Fourth Circuit regards *Cambridge Wire Cloth* as inapplicable to any case affected by the clarified rule. 720 F.2d at

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U.S. 474, 489 (1951), the abuse of discretion standard best alerts courts to "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). See also *Mosey Manufacturing Co.* v. *NLRB*, 701 F.2d at 618-619 (Swygert, J., dissenting).

1362. Although the Employer in this case filed its exceptions to the Regional Director's report before the date on which the Board published its clarified rule (September 14, 1981), it was not misled by any lack of clarity in the prior rule, because it in fact attached to its brief in support of the exceptions the documentary evidence, including affidavits, that it had submitted to the Regional Director (R. Doc. No. 12). Any conflict between the Ninth Circuit and the Fourth Circuit concerning the proper record in an election objections proceeding therefore is both of diminishing general significance and insubstantial in the context of this case.

In decisions rendered after those on which the Employer relies (Pet. 14-15), both the Fifth and Sixth Circuits have made it clear that, although they regard it as error per se for the Regional Director to fail to transmit to the Board any documentary evidence on which he has relied in making his findings on election objections, such error will not automatically require the court to deny enforcement of the Board's order. *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 356 (6th Cir. 1983) ("[t]his error may serve as a basis for denying enforcement * * * only if the exceptions present substantial factual issues"); *NLRB* v. *Fruehauf Corp.*, 720 F.2d 1398, 1402 (5th Cir. 1983) ("we have never held that a remand will follow in every case in which [the] preferred practice [of transmitting all documentary evidence relied upon] is not followed").[9] Thus, it is not at all apparent that the Fifth and

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[9]In *Fruehauf*, the Board had not simply adopted the Regional Director's findings, as it did here (Pet. App. 19). Rather, it had corrected at least one of his findings and made a factual assumption about one of the issues (720 F.2d at 1402). The court regarded the Board's modifications as an acknowledgement that resolution of the issues raised by the employer in its exceptions "require[d] factual review" (*ibid.*), and concluded that such review was inadequate without scrutiny of the underlying affidavits (*id.* at 1403). In the present case, as the court of appeals pointed out (Pet. App. 38), the only factual findings based on evidence that was not before the Board were irrelevant to the decision adopted by the Board.

Sixth Circuits would have reached a different result had they decided the present case.[10]

In a decision issued before *Kitchen Fresh* and *Fruehauf*, the Seventh Circuit took a different view, holding in *Prairie Tank Southern, Inc.* v. *NLRB*, 710 F.2d 1262, 1265, 1267 (1983), that, under its rule established in *NLRB* v. *Allis-Chalmers Corp.*, 680 F.2d 1166 (1982), when the Regional Director fails to transmit to the Board all affidavits collected in his investigation of election objections the unfair labor practice order predicated on the decision in that representation case "cannot be enforced." The apparent conflict is not, however, ripe for decision. In *Allis-Chalmers*, the Seventh Circuit expressly relied on what it viewed as the "per se" rules of the Fifth and Sixth Circuits (680 F.2d at 1168-1169). Until the Seventh Circuit considers the actual rules of those circuits (see page 13, *supra*) and rejects them, there is no need for intervention by this Court.

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[10] The Employer's claim (Pet. 15-16) of intra-circuit conflict also is without merit, as the Ninth Circuit's recent decision in *NLRB* v. *West Coast Liquidators, Inc.*, No. 83-7121 (Feb. 9, 1984), slip op. 9 n.2, makes clear. There the court explained the decisions on which the Employer relies (Pet. 15-16) as entirely consistent with the rule that remand will not be required where no prejudice is shown to have resulted from the failure to transmit affidavits. Of course, intra-circuit conflicts are not, in any event, grounds for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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